

1 MCGREGOR W. SCOTT
United States Attorney
2 LAURA D. WITHERS
Assistant United States Attorney
3 2500 Tulare Street, Suite 4401
Fresno, California 93721
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5 Attorneys for Plaintiff
United States of America

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7 IN THE UNITED STATES DISTRICT COURT
8 EASTERN DISTRICT OF CALIFORNIA

9 UNITED STATES OF AMERICA,
10
Plaintiff,
11
v.
12 FRANCISCO JAVIER HERRERA-REYES,
13
Defendant.

CASE NO. 1:20-CR-00021-NONE-SKO

STIPULATION REGARDING EXCLUDABLE
TIME PERIODS UNDER SPEEDY TRIAL ACT;
FINDINGS AND ORDER

DATE: May 8, 2020
TIME: 10:00 a.m.
COURT: Hon. Dale A. Drozd

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15 This case is set for change of plea on May 8, 2020. On April 17, 2020, this Court issued General
16 Order 617, which suspends all jury trials in the Eastern District of California scheduled to commence
17 before June 15, 2020, and allows district judges to continue all criminal matters to a date after June 1.
18 This and previous General Orders were entered to address public health concerns related to COVID-19.

19 Although the General Orders address the district-wide health concern, the Supreme Court has
20 emphasized that the Speedy Trial Act's end-of-justice provision "counteract[s] substantive
21 openendedness with procedural strictness," "demand[ing] on-the-record findings" in a particular case.
22 *Zedner v. United States*, 547 U.S. 489, 509 (2006). "[W]ithout on-the-record findings, there can be no
23 exclusion under" § 3161(h)(7)(A). *Id.* at 507. Moreover, any such failure cannot be harmless. *Id.* at
24 509; *see also United States v. Ramirez-Cortez*, 213 F.3d 1149, 1153 (9th Cir. 2000) (explaining that a
25 judge ordering an ends-of-justice continuance must set forth explicit findings on the record "either orally
26 or in writing").

27 Based on the plain text of the Speedy Trial Act—which *Zedner* emphasizes as both mandatory
28 and inexcusable—General Orders 611, 612, and 617 require specific supplementation. Ends-of-justice

1 continuances are excludable only if “the judge granted such continuance on the basis of his findings that
 2 the ends of justice served by taking such action outweigh the best interest of the public and the
 3 defendant in a speedy trial.” 18 U.S.C. § 3161(h)(7)(A). Moreover, no such period is excludable unless
 4 “the court sets forth, in the record of the case, either orally or in writing, its reason or finding that the
 5 ends of justice served by the granting of such continuance outweigh the best interests of the public and
 6 the defendant in a speedy trial.” *Id.*

7 The General Orders exclude delay in the “ends of justice.” 18 U.S.C. § 3161(h)(7) (Local Code
 8 T4). Although the Speedy Trial Act does not directly address continuances stemming from pandemics,
 9 natural disasters, or other emergencies, this Court has discretion to order a continuance in such
 10 circumstances. For example, the Ninth Circuit affirmed a two-week ends-of-justice continuance
 11 following Mt. St. Helens’ eruption. *Furlow v. United States*, 644 F.2d 764 (9th Cir. 1981). The court
 12 recognized that the eruption made it impossible for the trial to proceed. *Id.* at 767-68; *see also United*
 13 *States v. Correa*, 182 F. Supp. 326, 329 (S.D.N.Y. 2001) (citing *Furlow* to exclude time following the
 14 September 11, 2001 terrorist attacks and the resultant public emergency). The coronavirus is posing a
 15 similar, albeit more enduring, barrier to the prompt proceedings mandated by the statutory rules.

16 In light of the societal context created by the foregoing, this Court should consider the following
 17 case-specific facts in finding excludable delay appropriate in this particular case under the ends-of-
 18 justice exception, § 3161(h)(7) (Local Code T4).¹ If continued, this Court should designate a new date
 19 for the change of plea. *United States v. Lewis*, 611 F.3d 1172, 1176 (9th Cir. 2010) (noting any pretrial
 20 continuance must be “specifically limited in time”).

21 STIPULATION

22 Plaintiff United States of America, by and through its counsel of record, and defendant, by and
 23 through defendant’s counsel of record, hereby stipulate as follows:

- 24 1. By previous order, this matter was set for status on May 8, 2020.
- 25 2. By this stipulation, defendant now moves to continue the status conference until June 19,
 26 2020, and to exclude time between May 8, 2020, and June 19, 2020, under Local Code T4.

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 28 ¹ The parties note that General Order 612 acknowledges that a district judge may make
 “additional findings to support the exclusion” at the judge’s discretion. General Order 612, ¶ 5 (E.D.
 Cal. March 18, 2020).

3. The parties agree and stipulate, and request that the Court find the following:

a) The government has represented that the discovery associated with this case has been either produced directly to counsel and/or made available for inspection and copying.

b) Counsel for defendant desires additional time to consult with his client, the review the current charges, to review discovery in this matter, to discuss potential resolution with is client, and to prepare for sentencing as this is an immigration fast-track case where change of plea and sentencing would occur at the same time.

c) Counsel for defendant believes that failure to grant the above-requested continuance would deny him/her the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

d) The government does not object to the continuance.

e) In addition to the public health concerns cited by General Order 617, and presented by the evolving COVID-19 pandemic, an ends-of-justice delay is particularly apt in this case because defendant does not consent to proceed to change of plea and sentencing using videoconferencing pursuant to General Order 614.

f) Based on the above-stated findings, the ends of justice served by continuing the case as requested outweigh the interest of the public and the defendant in a trial within the original date prescribed by the Speedy Trial Act.

g) For the purpose of computing time under the Speedy Trial Act, 18 U.S.C. § 3161, et seq., within which trial must commence, the time period of May 8, 2020 to June 19, 2020, inclusive, is deemed excludable pursuant to 18 U.S.C. § 3161(h)(7)(A), B(iv) [Local Code T4] because it results from a continuance granted by the Court at defendant's request on the basis of the Court's finding that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.

4. Nothing in this stipulation and order shall preclude a finding that other provisions of the Speedy Trial Act dictate that additional time periods are excludable from the period within which a trial must commence.

IT IS SO STIPULATED.

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3 Dated: April 23, 2020

McGREGOR W. SCOTT
United States Attorney

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5 /s/ LAURA D. WITHERS
LAURA D. WITHERS
6 Assistant United States Attorney

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8 Dated: April 23, 2020

/s/ BENJAMIN A. GERSON
BENJAMIN A. GERSON
9 Counsel for Defendant
FRANCISCO JAVIER
10 HERRERA-REYES

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14 **FINDINGS AND ORDER**

15 IT IS SO ORDERED.

16 Dated: **April 23, 2020**


17 UNITED STATES DISTRICT JUDGE